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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 539

STEPHEN CALLAGHAN, PERCIVAL E. JACKSON and WILLIAM M. GREVE, individually and as trustees in bankruptcy and as trustees in reorganization of ALLIED OWNERS CORPORATION,

Petitioners,

against

RECONSTRUCTION FINANCE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION, RESPONDENT.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR RESPONDENT.

Introductory.

This case relates to an allowance of compensation to the petitioners for services rendered as bankruptcy trustees in

a bankruptcy proceeding which was superseded by a reorganization proceeding under Section 77B of the Bankruptcy Act.*

The District Court for the Eastern District of New York entered two orders (R. 217-219, 220-221), one allowing the petitioners as trustees in the bankruptcy proceeding the amount of $90,000 for services rendered in that proceeding during a ten-month period, and the other directing the petitioners, as trustees appointed in the reorganization proceeding, to pay themselves that amount. An application by respondent Reconstruction Finance Corporation to vacate and set aside the orders and to revise the allowance to the petitioners (as well as certain other allowances) was denied by the District Court in a third order (R. 270-271).

On appeal by the respondent from all three orders, the Circuit Court of Appeals modified the orders of the District Court by reducing the allowance to the petitioners for their services in the bankruptcy proceeding as bankruptcy trustees from $90,000 to $14,628.50,† the maximum compensation permitted by Section 48 of the Bankruptcy Act, which the Circuit Court held to be applicable. The Circuit Court stated that irrespective of Section 48 (a) "the amount awarded by the District Court was plainly excessive" (R. 292).

On December 9, 1935, this Court granted a writ of certiorari.

Opinions Below.

The opinions of the District Court are not reported but are printed in the Record (R. 216-217, 263-269). The opinion of the Circuit Court of Appeals is reported in 79 F. (2d) 187 and appears at R. 287-295.

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* A companion case, *Stitt* v. *Reconstruction Finance Corporation*, No. 540, involves the compensation of the Referee for his services in the same bankruptcy proceeding.

† No moneys whatsoever have been paid to creditors in either proceeding. The award of $14,628.50 was computed as 2% of $731,425.57 cash "turned over", of which a portion was disbursed by the petitioners in the conduct of the business during the bankruptcy and the major portion turned over on the termination of the bankruptcy proceeding by the petitioners to themselves as trustees appointed in the Section 77B proceeding.

Jurisdiction.

The opinion of the Circuit Court of Appeals was rendered on July 22, 1935, the order for the mandate thereon was entered on July 29, 1935, and the mandate was filed on September 18, 1935.

Jurisdiction is invoked under Section 240 (a) of the Judicial Code, as amended (U. S. C. Title 28, Sec. 347a).

Statement of the Case.

On August 8, 1933, Allied Owners Corporation was adjudicated a bankrupt upon its voluntary petition (R. 102).

On August 25, 1933, petitioners Stephen Callaghan and Percival E. Jackson became trustees in bankruptcy (R. 4). On September 14, 1933, petitioner William M. Greve became a trustee in bankruptcy (R. 103). The delay in the qualification of Mr. Greve was due to his rejection by the Referee because of an alleged disqualification, such rejection being reversed by the District Court (R. 2, 103, 147).

On June 22, 1934, less than ten months after such appointments*, the bankruptcy proceeding was superseded by a proceeding for reorganization under Section 77B of the Bankruptcy Act, and the former trustees in bankruptcy were appointed trustees in the reorganization proceeding (R. 103).

On January 29, 1935, more than seven months after the termination of the bankruptcy proceeding, the petitioners as bankruptcy trustees filed an application for allowances aggregating $142,059.96 for services in the bankruptcy proceeding (R. 4-102). In their application, the petitioners stated (R. 98), "We are advised and verily believe that we are entitled to receive, under the provisions of the Bankruptcy Act, * * *,

* During their term of less than ten months as bankruptcy trustees, not one of the petitioners devoted anything approaching all of his time to this bankruptcy. Messrs. Callaghan and Jackson actively engaged in the general practice of the law, and Mr. Greve engaged in many diverse business activities not related to the bankrupt (R. 248-249, 252).

and in view of our continuation in business, a maximum of two per cent upon the amount which passed through our hands." This "maximum" was based by the petitioners upon the assumption that Section 48 of the Bankruptcy Act was applicable.* Their petition for certiorari is now based entirely on the argument that Section 48 is not applicable.

On February 4, 1935, the Referee in Bankruptcy gave notice to creditors of a hearing to be held on the trustees' application and other applications for allowances for bankruptcy services (R. 187-188).

At the hearing before the Referee virtually all the creditors represented at the hearing (including the respondent and *all* other substantial creditors) objected to the allowance applied for by the petitioners as illegal and excessive.

On March 5, 1935, the Referee filed his report (R. 203-216) in the bankruptcy proceeding recommending a final allowance to the three petitioners of $60,000 for their services as trustees in the bankruptcy proceeding to be equally apportioned among them. In his report the Referee stated that if Section 48 of the Bankruptcy Act applied, the maximum commissions for the bankruptcy trustees would be $14,628.50 if based on "cash turned over", or $284,119.92 if based on "money and property turned over" (R. 212-213).†

On March 8, 1935, Judge Inch filed a memorandum (R. 216-217) increasing the aggregate allowance to the petitioners as bankruptcy trustees from $60,000 to $90,000 (an increase of 50%) *without any further hearing of any kind.*

On March 11, 1935, Judge Inch entered an order (R. 217-219) fixing the petitioners' allowance as bankruptcy trustees in accordance with the memorandum, and another order

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* In then admitting the applicability of Section 48, the petitioners contended that commissions could be computed upon property turned over as well as cash, although Section 48 refers specifically to "moneys". (R. 98, 209). The Circuit Court of Appeals dismissed this contention (R. 291-292) and petitioners are not now urging it (Petitioners' Brief, p. 11).

† For some reason which is not clear, the Referee divided each of these two amounts in half, making allowable "one-half for bankruptcy services."

(R. 220-221) in the reorganization proceeding directing the payment of such allowance.

On March 20, 1935, on the petition of the respondent (R. 225-233), Judge Inch signed an order (R. 222-224) directing the bankruptcy trustees (and others to whose allowances objections were taken) to show cause why the orders of March 11, 1935 should not be vacated and set aside and the allowances reduced to legal and reasonable amounts. After a hearing, Judge Inch filed an opinion (R. 263-269) deciding against the respondent. On May 13, 1935, he entered an order (R. 270-271) denying its motion.

On appeal of the respondent from the orders of March 11, 1935 and the order of May 13, 1935, the Circuit Court of Appeals held, in an opinion (R. 287-295) by Judge Augustus N. Hand, that Section 48 (a) and (e) are applicable to and limit compensation of bankruptcy trustees for services in a bankruptcy proceeding and that a supervening proceeding under Section 77B does not remove such limitations. The court accordingly reduced the allowance to the bankruptcy trustees to the aggregate amount of $14,628.50 (R. 289, 292), being the *maximum* statutory commission permitted on the moneys disbursed or turned over by the bankruptcy trustees. In its opinion the Circuit Court of Appeals said (R. 289ff.):

> "If Section 48 (a) and (e) had been applied, the trustees in bankruptcy would have been limited to the statutory fees on $731,425.57 cash turned over by them, or $14,628.50. But it is argued that their compensation was subject to no such limitations and that the language of 77B (i) leaves the amount of compensation for services in the prior bankruptcy proceeding to the discretion of the judge in the reorganization proceeding guided only by the 'rule of reason'. In our opinion, however, Section 48 (a) fixes the bounds of the fees which the trustees in bankruptcy can claim.
>
> * * * Under 77B (j) the reorganization court is given power to pay allowances which have been fixed by the prior court only to the extent that they are found reasonable. Nothing in the language of the sub-

division suggests the removal of any restriction which may exist upon the prior court in the determination of allowances. Indeed it is impossible to imagine that court awarding compensation in excess of limitations imposed by a statute to which its orders are made subject. It seems equally unlikely that the reorganization court should be empowered by mere implication to make allowances for services by the agencies of another court which the statutes governing the action of that court forbid.

* * * While we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a) *the amount awarded by the District Court was plainly excessive.* The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and *were far less burdensome than those of their counsel.*" (Italics ours.)

That court awarded $50,000 to the petitioners' counsel for their services in the bankruptcy proceeding (R. 293) and no review of that award has been sought by such counsel.

The petitioners herein are not only bankruptcy trustees in the bankruptcy proceeding but also reorganization trustees in the reorganization proceeding and will make application for allowances in their latter capacity in that proceeding* (R. 292).

Question Presented.

Whether bankruptcy trustees may be allowed compensation in excess of the maximum permitted by Section 48 of the Bankruptcy Act for services performed in a bankruptcy proceeding which has been superseded by a Section 77B reorganization proceeding.

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* The reorganization proceeding is still being carried on. A plan of reorganization was not confirmed until June 13, 1935, almost one year after the reorganization proceeding was begun; the plan has not yet been consummated.

Summary of Argument.

The allowance to the petitioners was fixed by a bankruptcy court in a bankruptcy proceeding for services rendered as trustees in bankruptcy in that proceeding. Section 48 of the Bankruptcy Act is applicable to and limits the compensation of trustees in bankruptcy and the compensation allowed by the court below was the maximum permitted by Section 48.

The fact that a proceeding for reorganization under Section 77B superseded the bankruptcy proceeding does not remove the limitation on compensation of trustees in bankruptcy for bankruptcy services. On the contrary, Section 77B, subdivision (i) specifically makes provision only for the payment of "such reasonable * * * allowances in the prior proceeding as may be *fixed* by the court appointing said receiver or prior trustee." Nothing in Section 77B remotely suggests that the prior court in *fixing* allowances is free of the express statutory limitations imposed by other existing sections of the Bankruptcy Act, such as Section 48.

That Congress had in mind that other sections of the Bankruptcy Act could not appropriately apply to *"proceedings instituted under"* Section 77B is shown by the language of subdivision (k) of that section. No attempt was made to exclude or change any rules or restrictions applicable to prior proceedings.

The prior bankruptcy proceeding and the Section 77B proceeding are entirely independent and separate proceedings. Independent express statutory provisions exist and are applicable to each in *fixing* the compensation of its own officers.

To hold that Congress intended by implication to remove the limitations of Section 48 would do violence to the unambiguous and careful language used in Section 77B; it would also run directly counter to the expressed intent of Congress that administrative costs be kept at a minimum.

If, nevertheless, this Court should determine that Section 48 is inapplicable to the petitioners' allowance, the allowance of $90,000 made by the District Court should not be rein-

stated. Even the amount of $60,000 recommended by the referee would be unreasonable, excessive and exorbitant. The services of the petitioners as bankruptcy trustees were part time services, lasted less than ten months, and were preliminary and inconclusive in character. The amount of $14,628.50 which the lower court allowed by an application of Section 48 more nearly approximates a reasonable allowance for such services.

If, therefore, this Court should hold Section 48 inapplicable, we submit for the reasons given below that it may properly, and should, either determine what constitutes reasonable compensation or remand the matter to the Circuit Court of Appeals for its determination in accordance with rules and standards laid down by this Court.

ARGUMENT.

POINT I.

The allowance to the petitioners was fixed in a bankruptcy proceeding for services rendered as trustees in bankruptcy in that proceeding. The amount awarded is the maximum permitted by the Bankruptcy Act.

A.

Section 48 applies to compensation of trustees in a bankruptcy proceeding. Section 77B provides that the court in the prior bankruptcy proceeding must fix allowances for bankruptcy services and does not remove or affect in any way the limitations imposed by Section 48 on the prior bankruptcy court.

As public officers appointed under Sections 33 and 44 of the Bankruptcy Act, the petitioners must show "clear warrant of law" to be entitled to compensation for the perform-

ance of their duties.* Their compensation obviously cannot exceed the maximum permitted by the statute under which they were appointed.

The allowance to the petitioners as trustees in bankruptcy was fixed by a *bankruptcy* court for services rendered in a *bankruptcy proceeding.*

Section 48 of the Bankruptcy Act fixes the maximum compensation allowable to trustees in bankruptcy, providing that they "shall receive for their services * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts, not to exceed" the limitations therein set forth. (Sec. 48 (a), 11 U. S. C. Sec. 76 (a)).† The amount awarded by the lower court to the petitioners was the maximum permitted by this Section.

It necessarily follows that the limitations as to their compensation imposed by Section 48 are applicable, unless it can be clearly shown that Section 77B otherwise provides.

On June 7, 1934, Section 77B was added to the Bankruptcy Act and on June 22, 1934, the bankruptcy proceeding in which the allowance was later fixed was superseded by the institution of a Section 77B reorganization proceeding.

Subdivision (i) of Section 77B provides that when a trustee of the property of a corporation has been appointed and is acting in a prior proceeding at the time the Section 77B proceeding is commenced, the judge in the latter proceeding

> "shall make such orders as he may deem equitable * * * for the payment of such *reasonable* administrative expenses and *allowances in the prior proceeding as may be ...ed by the court appointing said * * * prior trustee.*'‡ (Italics supplied.)

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* See *Realty Associates Securities Corporation* v. *O'Connor*, 295 U. S. 295, at p. 299. The same section of the Bankruptcy Act which creates the office of referee also creates the office of trustee (Section 33).

† See Appendix, pp. 36-37, for full text of subdivisions (a), (b) and (e) of Section 48, and of Sections 33 and 44.

‡ For the full text of subdivision (i) of Section 77B, see Appendix, pages 38-39.

The language quoted expressly provides that the court in the *prior proceeding* (in this case the bankruptcy court), is to fix the allowance of the prior trustee. Nothing in the quoted language remotely suggests the removal of any restriction or limitation (such as Section 48) imposed upon the prior court in fixing of allowances for services rendered in the prior proceeding.

The quoted language expressly recognizes the fact that the prior proceeding and the Section 77B proceeding are independent proceedings. Each has its own independent provisions for the fixing of trustees' compensation. Section 77B, subdivision (c), covers trustees appointed and acting in a proceeding instituted under Section 77B and subdivision (k) provides that Section 48 does not apply to such compensation. Section 48 establishes the maximum which a bankruptcy court may allow the trustees in a bankruptcy proceeding.

The petitioners admit that it is the court in the prior proceeding which is called upon to fix their compensation (Br., pp. 7, 15-16, 20). In spite of this admission based on the plain language used in Section 77B (i), and their statement that "it is not the contention of the petitioners * * * that Section 77B (i) does away with or in any way affects the restrictions or limitations found in Section 48" (Br. p. 17), the petitioners are apparently attempting to construe the word "reasonable" as used in Section 77B (i) either to do away with the limitations of Section 48 or to substitute a new rule for the court *in the prior proceeding* to use in fixing fees. As a matter of law, allowances to trustees in bankruptcy have always had to be *reasonable* within the limitations of Section 48 and the use of the word "reasonable" establishes no new standard even in bankruptcy.

In re Morris Bros., 8 F. (2d) 629.

Clearly, the word "reasonable" was inserted in subdivision (i) of Section 77B, not to remove existing limitations on the allowances of the prior court, but to give the Section 77B

judge the right, before directing payment, to *review* the allowances fixed by the prior court. Obviously, the prior proceedings may be state court receiverships, or federal equity receiverships, as well as prior bankruptcy proceedings. Even in a *prior* bankruptcy proceeding, an allowance to trustees may be unreasonable though below the maximum permitted by Section 48.* Congress clearly intended to give the Section 77B judge the right to protect the debtor's estate by providing for a right of review. Without such right, the Section 77B judge, having the debtor's estate under his sole control, would have no check on payments to be made therefrom upon orders of a prior state or federal court.

Not only does it appear clear from subdivision (i) itself that the word "reasonable" was inserted to provide such right of review, but the courts have so held.

In re New York Investors, Inc., 79 F. (2d) 179; certiorari denied, — U. S. —, Dec. 9, 1935;
In re 211 East Delaware Place Bldg. Corporation, 7 F. Supp. 892.

In *In re New York Investors, Inc., supra,* at page 181, the Circuit Court of Appeals for the Second Circuit said, with reference to subdivision (i) of Section 77B:

> "We think these provisions were inserted in the act in order to give the court in charge of the reorganization proceedings the benefit of the experience of the prior court, in estimating the fair value of the services of such persons as are entitled to compensation. There could be no sufficient reason for providing that the Section 77B court should make such orders as it might deem equitable 'for the payment of * * * reasonable administrative expenses and allowances in the prior proceeding' unless it were to have the power to reduce and to decline to pay such as were unreasonable. Any-

* In one bankruptcy proceeding, prior to its being superseded by a proceeding under Section 77B, a large dividend had been paid to creditors on which the maximum limit of trustee's compensation could be based under Section 48. The dividend amounted to 50% of claims. *Matter of United Cigar Stores Company of America, Bankrupt*, Southern District of New York.

> thing less than this would render the words 'equitable' and 'reasonable' nothing more than hortatory terms designed to exhort the prior court to practice moderation."

As the court below said (R. 290):

> "We think it plain that the words *'equitable' and 'reasonable'* were intended to mean 'reasonable' in the eyes of the reorganization court, and *were to serve only as a check by the section 77B court* on payments which might affect the proposed reorganization unfairly." (Italics ours.)

The petitioners concede (Br. pp. 15-17, 19) the correctness of the determination by the court below that the word "reasonable" was inserted to provide the judge in the Section 77B proceeding with the important right to review allowances fixed in the prior proceeding. They are in error however in implying (Br. p. 16) that the court below has placed a different construction on the right of review under subdivision (i) of Section 77B in the instant case involving a bankruptcy proceeding superseded by a reorganization proceeding and in *In re New York Investors, supra,* which it decided on the same day and which involved allowances in an equity receivership superseded by a reorganization proceeding. The court below said (R. 289):

> "We have discussed the application of section 77B (i) in Matter of New York Investors, Inc. (C. C. A.) 79 F. (2d) 182, so far as it relates to the fixing of fees in a prior equity receivership. *The principles involved where the prior insolvency proceeding is in bankruptcy are the same.*" (Italics ours.)

Possibly the fact that there is no mathematical statutory limitation on fees payable in equity receiverships has led the petitioners into thinking that a different principle had been applied.

As the Court below said (R. 290-291):

> "Under 77B (i) the reorganization court is given power to pay allowances which have been fixed by the prior court

only to the extent that they are found reasonable. Nothing in the language of the subdivision suggests the removal of any restriction which may exist upon the prior court in the determination of allowances. Indeed it is impossible to imagine that court awarding compensation in excess of limitations imposed by a statute to which its orders are made subject."

No comfort can be gained by the petitioners from the use of the word "equitable" in subdivision (i) of Section 77B. The words "as he may deem equitable" were necessarily used in connection with the power to make orders "for the protection of obligations incurred by the receiver or prior trustee." It is clear that the word "equitable" as used in the statute means in relation to situations existing in the reorganization proceeding, rather than with respect to the size of the compensation, which is already covered by the word "reasonable".

When petitioners filed their application, they themselves "verily believed" (R. 98) that Section 48 fixed the measure of their compensation.* They attempted, however, to include property, as well as moneys, as a proper measure for compensation.† Now their entire argument is based on a contention which we submit we have shown to be fallacious, that Section 48, although admittedly not amended or affected by Section 77B (petitioners' brief p. 17) is somehow inapplicable.

As a final argument, on page 22 of their Brief, the petitioners appear to contend that the provisions of subdivision (k) of Section 77B in some manner exclude the applicability of Section 48 to the fixing of allowances in prior proceedings superseded by reorganization proceedings.

Subdivision (k)‡ reads, in part, as follows:

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* In *Stitt* v. *Reconstruction Finance Corporation*, No. 540, the Referee *contends* that Section 40 applies to his compensation. The principle is exactly the same.

† Section 48 specifies "moneys". The Circuit Court of Appeals dismissed petitioners' contention (R. 291-292), and petitioners are not now urging it and in fact admit that properties may not be included (Petitioners' Brief, p. 11).

‡ For the full text of subdivision (k), see Appendix, page 39.

"If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: * * * (3) a trustee or trustees shall be appointed as provided in Section 44 and be compensated as provided in section 48: * * *. *None of the sections enumerated in this subdivision (k)* except * * * [here are excepted sections other than section 48] * * * *shall apply to proceedings instituted under this section 77B* unless and until an order has been entered directing the trustee or trustees to liquidate the estate. *All other provisions of this act,* except such as are inconsistent with the provisions of this section 77B, *shall apply to proceedings instituted under this section,* whether or not an order to liquidate the estate has been entered." (Italics supplied.)

Subdivision (k) by its very terms is dealing only with *"proceedings instituted under this section 77B."* The language is not applicable to any other proceeding and by subdivision (i), the fixing of bankruptcy allowances is for the bankruptcy court in the *prior proceeding.* As pointed out above, a prior bankruptcy proceeding and a Section 77B proceeding are entirely separate and independent proceedings. Each has its own statutory provisions governing the compensation of its own officers.

Obviously the only effect of the provision in subdivision (k) is to make Section 48 inapplicable to *"proceedings instituted under this Section 77B,"* until an order of liquidation is entered. *By no possible inference can this language be made applicable to a prior bankruptcy proceeding.*

B.

To hold that Section 48 is inapplicable would be contrary to Congressional intent as repeatedly expressed to keep administrative costs at a minimum. The general language of Section 77B is unambiguous and no amendment, modification or repeal of the specific provisions of Section 48 can be implied.

To construe the unambiguous language of subdivision (i) of Section 77B so as to remove the limitations of Section 48 would run directly counter to the intent of Congress that administrative costs be kept at a minimum.

Throughout the entire Bankruptcy Act the intent of Congress to avoid excessive costs is apparent. Economy in administration is the aim of the Act. Not satisfied with setting forth express limitations upon compensation of receivers, trustees and referees in Sections 48 and 40, Congress inserted in Section 72 a provision that

> "Neither the referee, receiver, marshal or trustee shall *in any form or guise* receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (Italics ours.)

The very Act of Congress in which the new Section 77B was included shows that Congress had in mind the necessity for limiting compensation in bankruptcy administration. Section 3 of the Act of June 7, 1934 provides in part:

> "The compensation allowed a * * * trustee * * * *shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate* of the bankrupt and the interests of the creditors therein." (Italics ours.)

The report of the House Judiciary Committee, dated June 2, 1934, on the proposed Section 77B (then known as H. R.

5884) clearly shows that the main purpose of Section 77B was to *reduce the cost* of reorganizing corporations.

The necessity for limiting compensation and avoiding excessive costs, as well as the Congressional intent to do so, has been recognized repeatedly by the courts. As recently as April 29, 1935, in *Realty Associates Securities Corporation, et al.* v. *O'Connor* (295 U. S. 295), this Court stated (at p. 299):

> "Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils. Strengthening Procedure in the Bankruptcy System, Sen. Doc. No. 65, 72d Congress, 1st Sess. (1932), p. 53; also H. R. Rep. 65, 55th Congress, 2d Sess. (1898), p. 44. In response to those complaints, Congress has attempted in the enactment of the present statute to fix a limit for expenses growing out of the services of referees and receivers."

See also

Continental Illinois National Bank v. *Chicago, Rock Island & Pacific R. R. Co. et al.*, 294 U. S. 648, decided April 1, 1935, at page 685, involving a railroad reorganization under Section 77 of the Bankruptcy Act;

In re Consolidated Distributors, Inc., 298 Fed. 859 (C. C. A. 2nd, 1924), at page 862;

In re Curtis, 100 Fed. 784 (C. C. A. 7th, 1900), at page 792.

The petitioners concede in their brief (p. 21) that, in enacting Section 77B, "it was the purpose of Congress to lessen the cost of insolvency proceedings which had long been regarded as too great."

Nevertheless, the petitioners contend for a construction which attempts to *remove* by implication only, an express limitation on allowances in the prior proceeding provided for by Section 48 and flies directly in the face of the Congressional purpose admitted by the petitioners.

In view of the clearly and repeatedly expressed Congressional policy for economy in bankruptcy administration it is inconceivable that Congress could be held to have intended to remove the limitations of Section 48 *without a clear and unambiguous expression of such intent.*

As the court below stated (R. 291):

> "It seems equally unlikely that the reorganization court should be empowered by mere implication to make allowances for services by the agencies of another court which the statutes governing the action of that court forbid."

The petitioners do not contend that the judge in a proceeding under Section 77B is given any power by the word "reasonable" in subdivision (i) to increase the amount of the allowances fixed by the court in the prior proceeding (Br., pp. 19-20). Any attempt to imply such a power in the reorganization court to increase allowances would render nugatory by implication merely the specific provisions of Section 48.* Similarly it would render nugatory the express provisions of Section 40 with regard to referees in bankruptcy.

The petitioners' contention that Section 77B substitutes "a reasonable allowance for a statutory allowance" (Br., p. 21) and that therefore Section 48 is not applicable to their compensation represents an attempt to use the general language of the later statute to repeal by implication the specific language of Section 48. Such a construction would be contrary to the well-settled principle of statutory construction frequently enunciated by this Court.

See

Washington v. *Miller,* 235 U. S. 422, 428;
Kepner v. *U. S.,* 195 U. S. 100, 125;
U. S, v. *Nix,* 189 U. S. 199, 205;
Rodgers v. *U. S.,* 185 U. S. 83, 87-89.

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* In accord with the decision of the court below is *In re Paramount Publix Corporation,* 12 F. Supp. 16, a case squarely in point. No other cases dealing with this point have been found.

See also

Posadas v. *National City Bank of New York*, U. S. , decided January 6, 1936, reported in Volume 3, United States Law Week, page 389, at p. 390;

Frost v. *Wenie*, 157 U. S. 46, 58.

In *Washington* v. *Miller*, *supra*, the Court stated at page 428:

> "In these circumstances we think there was no implied repeal, and for these reasons: First, such repeals are not favored, and usually occur only where there is such an irreconcilable conflict between an earlier and a later statute that effect reasonably cannot be given to both (United States v. Healey, 160 U. S. 136, 146; United States v. Greathouse, 166 U. S. 601, 605); second, where there are two statutes upon the same subject, the earlier being special and the later general, the presumption is, in the absence of an express repeal, or an absolute incompatibility, that the special is intended to remain in force as an exception to the general (Townsend v. Little, 109 U. S. 504, 512; Ex parte Crow Dog, Id. 556, 570; Rodgers v. United States, 185 U. S. 83, 87-89); and, third, there was in this instance no irreconcilable conflict or absolute incompatibility, for both statutes could be given reasonable operation if the presumption just named were recognized."

The construction of the statutes contended for by the petitioners in the instant case is directly contrary to the rule enunciated by this Court. No irreconcilable conflict exists between Section 48, the earlier special statute, and Section 77B (i), the later general one. No language indicating repeal or amendment of Section 48 is contained in Section 77B. Effect can be given both to the limitations of Section 48 and to the right of review provided for in subdivision (i) of Section 77B.

We submit that both Section 48 and Section 77B mean what they say and that the lower court correctly held Section 48 applicable to petitioners' compensation as trustees in bankruptcy in a bankruptcy proceeding.

C.

Contrary to petitioners' assertion, Section 48 has been held applicable in analogous situations where no liquidation or composition has occurred; supposed hardship is disregarded.

The petitioners appear to contend in their brief (pp. 11 and 12) that Section 48 should be held inapplicable to bankruptcy trustees' compensation when the bankruptcy proceeding is terminated by a Section 77B proceeding, because no provision is made in Section 48 for commissions to bankruptcy trustees where property has been turned over by them in kind, and because the Section is stated not to meet the situation which arises when the bankruptcy proceeding is cut off without a liquidation or a composition.

The petitioners have evidently not considered the case of

In re Detroit Mortgage Corporation, 12 Fed. (2d) 889, certiorari denied 273 U. S. 713.

In that case the Circuit Court held that Section 48 applied to the compensation of a bankruptcy receiver where the bankruptcy proceedings were abruptly terminated (without liquidation or composition) by the dismissal of the petitioning creditors' petition, the court saying, at page 891:

> *"Clearly, too, under section 48, no compensation can be based upon the value of property turned back* to the alleged bankrupt. *However great the hardship* resulting from this construction, *the language of the act* is in *this respect entirely clear."* (Italics ours.)

Other decisions involving the rule that irrespective of the question of hardship, Section 48 is applicable even where the major part of the assets "turned over" consists of properties and not moneys, include the following:

In re Morris Bros., 8 F. (2d) 629;
In re Chimovitz, et al., 30 F. (2d) 114.

See also

American Surety Co. v. *Freed,* 224 Fed. 333.

In *In re Morris Bros., supra,* the court stated at page 630:

> "Unless, therefore, the law authorizes the payment of commission on property turned over by the referee to the claimants, such compensation cannot be allowed, however meritorious. It seems to me that the statute is plain and unambiguous. The commissions of the referee are to be computed on '*moneys* disbursed to creditors,' and that of the trustee 'on *moneys* disbursed or turned over to any persons including the lienholders.' In each case it is the moneys disbursed or turned over, and not property, that forms the basis for such allowance. It may be that this will work a hardship in some cases, and perhaps in the instant case; but that affords no reason why the law as written should not be observed." (Italics are the court's.)

See also *In re Curtis,* 100 Fed. 784, where the court said at page 792:

> *"The present act,* so far as it specifies the amount of fees of officers whose services may be required in execution of the law, *fixes them at a low figure, possibly much lower than is compensation for the service; but it is not for us, for that reason, to disregard the law, or seek to thwart the design of Congress, however inadequate we may think the compensation allowed."* (Italics ours.)

D.

The holding that Section 48 is applicable will not have the deleterious effect on future bankruptcy administration feared by the petitioners.

The petitioners contend (Br., pp. 8, 18) that if the restrictions of Section 48 are held applicable to allowances for services in a bankruptcy later superseded by a Section 77B proceeding, trustees in bankruptcy will be tempted to liquidate assets with a view to increasing their commissions.

The asserted danger of unwise liquidation is of course without substance, as bankruptcy trustees can sell assets only under court supervision. If creditors cannot be relied upon

to elect men as trustees who would shrink from administering their trust solely for their own advantage, the courts may be relied upon to avoid precipitous or ill-advised sales recommended by trustees merely for their own ends.

It seems clear that as a practical matter, all financially embarrassed corporations desiring to reorganize will either go directly under Section 77B (rather than into ordinary bankruptcy) or, if forced into ordinary bankruptcy, will immediately go under Section 77B as permitted by the provisions of subdivision (a) of Section 77B, which provides in part:

> "(a) Any corporation * * * may file an original petition, or, before adjudication in an involuntary proceeding, an answer, or in any proceeding pending in bankruptcy, whether filed before or after this section becomes effective, * * * a petition * * * that it desires to effect a plan of reorganization."

See *In re Kelly-Springfield Tire Co.*, D. C., Maryland, November, 1935 (reported in Commerce Clearing House, Bankruptcy Law Service, Decisions Volume, p. 1766), in which the court stated that the desirability of avoiding prior insolvency proceedings is, it thought, "now commonly understood by the Bar."

Section 77B had not been enacted at the time the bankruptcy proceeding involved in this case was begun. Its provisions were not available to corporations in need of reorganization.

It is highly unlikely that in the future any Section 77B proceedings will, except in isolated instances, supersede ordinary bankruptcy proceedings, and that the contingencies feared by the petitioners will not as a practical matter ever arise.

POINT II.

If it should be held that Section 48 is inapplicable, the allowance of $90,000 by the District Court was clearly unreasonable, excessive and exorbitant and this Court should determine what constitutes reasonable compensation for the petitioners' services of less than ten months as trustees in bankruptcy, or remand the matter to the Circuit Court of Appeals for determination in accordance with principles laid down by this Court. The $14,628.50 awarded below more nearly approximates a reasonable allowance.

We submit that it is clear as a matter of law that Section 48 limits the allowance to the petitioners for their bankruptcy services and that the lower court in allowing them $14,628.50 has allowed the maximum to which they are entitled.

If, however, this Court should hold Section 48 inapplicable, the orders of the District Court,* allowing $90,000 to the petitioners, should not be affirmed as the allowance of that amount was unreasonable, excessive and exorbitant.

The lower court in its opinion stated (R. 292):

> "While we should allow a substantially larger compensation if we were at liberty to disregard Section 48 (a) the amount awarded by the District Court was plainly excessive. The services of the trustees only lasted ten months, were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel."

It is obvious that the lower court, having determined that Section 48 applied, did not have to analyze carefully the work

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* Without any further hearing or notice to creditors, the District Court increased the $60,000 recommended by the referee by fifty per cent. and allowed $90,000. Even the amount recommended by the referee was in excess of the highest amount suggested by any creditor at the hearing before him.

actually done by the petitioners and determine what amount would constitute reasonable compensation. The amount of $90,000 was "plainly excessive". We submit that the award of $14,628.50 more nearly approximates a reasonable allowance.

If, therefore, this Court should hold Section 48 inapplicable, we submit that it may properly* and should either determine the amount which would constitute reasonable compensation for the petitioners or remand the matter to the Circuit Court of Appeals for determination laying down such rules or standards as may be necessary. Otherwise, a reversal on the question of law alone might be taken as an indication of acquiescence in the reasonableness of the allowance made by the District Court.

A

The petitioners have sought to convey the impression that the construction of the Bankruptcy Act urged by the Respondent has resulted in a grossly inadequate award (Br. p. 10). It is submitted that an analysis of their services as shown by the record fails to support their contention.

1. During the period of less than ten months from August 25, 1933 until June 22, 1934, the petitioners devoted only a part of their time to the administration of the estate. In fact it appears that in the case of each trustee the administration of this estate was merely incidental to his other businesses or profession. Mr. Greve was engaged in many business activities not related to the bankrupt (R. 252), from which he derived considerable income† (R. 248), and the

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* This Court has power to dispose of all questions relating to the reasonableness of the allowance to the petitioners, irrespective of the ground on which certiorari was granted and even though it should hold for petitioners on the question of the applicability of Section 48. *Langnes* v. *Green*, 282 U. S. 531; *Story Parchment Co.* v. *Paterson Co.*, 282 U. S. 555.

† It seems that Mr. Greve's duties as trustee did not deprive him of other substantial compensation at least during the first half of the bankruptcy period. The trustees state that during 1933 Mr. Greve "performed the principal part of services" in certain matters "involving the affairs of the Bank of the United States, for which one of the corporations with which he was connected received in excess of $150,000" (R.

other trustees, who frankly admit that they were not experienced in the business of the bankrupt (R. 18), were actively engaged in the practice of law (R. 248, 249, 252).

The fact that the trustees did not devote full time to this estate is not stated in criticism. As indicated below, this was not a case in which full time services of a trustee were required. That fact has a direct bearing on the amount which would constitute reasonable compensation.

There is no reason why the appointment of three trustees should result in a fee larger than one trustee would receive unless the trustees did more work than one trustee could have done. Petitioners' application shows that most of the work was done by one trustee and that it did not occupy his full time.* No reason appears for awarding compensation larger in amount than one man would be reasonably entitled to receive for the services performed.†

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248). In the hearing before the Sabath Committee it was brought out that Mr. Greve also received $54,580.39 during 1933 for serving as an official of The Prudence Co. Inc., and in addition other amounts as salaries from New York Investors, Inc., of which company the bankrupt was a subsidiary (see report of hearing in the New York Times, October 17, 1935). From Chase National Bank v. Clark Henry Corporation, Misc. , 283 N. Y. S. 25, it appears that Mr. Greve was a member of the principal committee assisting in the reorganization of a corporation owning a large hotel. The court remarked that Mr. Greve and the other members of his committee "are all interested in the progress of the Borough of Brooklyn, and the success or failure of this enterprise is of importance to Brooklyn and to them. Therefore, it is necessary to ask men with knowledge and experience to contribute some of their time for the public good." The court, accordingly, allowed $11,000 of the $50,000 requested by the committee.

* Mr. Greve handled the more important matters pertaining to the Brooklyn Paramount Theatre (R. 40). He arranged for and attended all meetings with representatives of the bondholders who were threatening to foreclose (R. 41). He attended almost all the Paramount Publix meetings (R. 52) and generally handled the negotiations with that company's officials and trustees (R. 58, 64, 91) and he also took charge of the Loew negotiations (R. 76, 77).

† This principle is recognized in bankruptcy administration in the provisions of Section 48(b) providing that where three trustees act the court shall apportion fees and commissions between them "so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to". While by hypothesis Section 48(b) cannot determine compensation where Section 48 does not apply, it may be said to indicate the principle involved.

2. The services here involved are limited to the bankruptcy services rendered from August 25, 1933, to June 22, 1934, when the bankruptcy proceeding was superseded. Much of the petitioners' lengthy and redundant application for compensation relates to matters that were not completed until after the termination of the bankruptcy proceeding. For services rendered thereafter, the petitioners who were also appointed trustees in the Section 77B proceeding will be compensated in that proceeding (R. 292).

3. The bankrupt was a real estate holding company, with total assets valued by the trustees at $14,205,996.18 (R. 100). Its principal assets consisted of seven motion picture theatre buildings, a participation of $825,000 in a note of Ringling Bros. and others, and cash on hand (R. 8-17, 100). The bankrupt also had important claims against the lessees' of such buildings, which required primarily legal work and are discussed generally below. The conduct of the business required very little administrative work since all of the bankrupt's real properties were leased to and managed or operated by other corporations (R. 13-17). For the most part the arrangements under which the theatres were leased or operated by others were made prior to the bankruptcy and were continued without change, the only apparent exception relating to certain modifications of the arrangement as to one of the theatres. The actual business administration was therefore extremely simple in character.

4. A fuller analysis of the services of the petitioners during the bankruptcy proceeding shows clearly that the administration of the business was not burdensome and that the petitioners' accomplishments during the bankruptcy period were of a preliminary and inconclusive nature. It was not until June 13, 1935, almost one year after the bankruptcy proceedings terminated, that a plan of reorganization was finally confirmed. This plan has not even yet been consummated.

On August 8, 1933, the date of adjudication, the principal assets of the bankrupt consisted of seven motion picture theatres, all subject to long-term lease or purchase contracts to Paramount Publix Corporation. The contracts as to three of the theatres had been assigned to Loew's Theatre & Realty Corporation and guaranteed by Loew's, Incorporated (R. 105-106). Prior to August 8, 1933, both Paramount Publix Corporation and the Loew companies had defaulted on their contracts and temporary leasing arrangements covering the seven theatres had been entered into by the bankrupt (R. 106).

The petitioners exercised only a very general supervision as landlords over the management of all seven theatres. An office building in which one of the theatres was located was managed, not by the petitioners, but by a management company pursuant to a contract entered into prior to the bankruptcy (R. 13-15).

During the bankruptcy proceeding, the petitioners continued all the temporary leasing arrangements without change (R. 14-17) except for certain modifications relating to one of the theatres controlled by Paramount (R. 142-143). These modifications involved negotiations by the petitioners and their counsel with the Paramount interests (R. 68, 82, 86) and questions of business judgment as to the policy of operating the theatre on a straight picture basis or on a picture and stage show basis (R. 51).

During the bankruptcy the petitioners filed an amended increased claim against Paramount in its bankruptcy proceeding, prepared by the petitioners' counsel (R. 29, 38), and commenced negotiations with the Paramount trustees looking towards a settlement (R. 64, 83-84, 95). No final settlement was negotiated until several months after the completion of the bankruptcy proceeding (R. 230), and the settlement was not approved by the Allied Owners Corporation Section 77B court until June 14, 1935.

During the bankruptcy the petitioners through their counsel took charge of the suits theretofore commenced by the Cor-

poration against the Loew companies, and commenced a third action. The actual steps taken during bankruptcy by the petitioners' counsel were confined to the preparation of pleadings, study of facts and of questions of law, preparation for trial and various preliminary skirmishes. Although the record shows that the petitioners were consulted, it is obvious that substantially all of the work was done by their counsel and not by the petitioners (R. 51, 111-121).

During the bankruptcy, negotiations for the settlement of the Loew litigation were carried on by the petitioners, their counsel, and creditors of Allied Owners Corporation. Although very substantial progress towards settlement was made, a settlement agreement was not signed until July 25, 1934, more than one month after the end of the bankruptcy proceeding. The settlement agreement was later amended, and was not approved in the Section 77B proceeding until June 13, 1935.

During the bankruptcy proceeding, attempted foreclosure proceedings by the trustee of the first mortgage bonds of Allied Owners Corporation were successfully resisted; obviously the major part of the work in connection therewith was done by the petitioners' counsel (R. 124-127).

The only important asset of the corporation, in addition to the seven theatres, was a participation of $828,000 in a note of Ringling Brothers—Barnum & Bailey Combined Shows, Inc. and Circus City's Zoological Gardens, Inc., endorsed by John Ringling. The note is not due until 1937, and all interest has been paid thereon to date. The status of the note remained unchanged during the bankruptcy proceeding, the petitioners' counsel, however, successfully resisting two legal proceedings brought by John Ringling in an attempt to rescind the pledge of the collateral securing his guaranty (R. 8-10, 134-140).

Although considerable space was devoted by the petitioners in their application for an allowance to the fact that a basis for reorganization was laid during the bankruptcy proceeding (R. 74, 76, 77, 78, 97), it is obvious that the progress

made during bankruptcy was of a very preliminary and inconclusive nature. It was not until months after the bankruptcy had been superseded that the Paramount settlement was worked out and although considerable negotiating had been done with respect to the Loew settlement, the settlement agreement was not signed until after such termination and it was later amended. These settlements involved all seven of the theatre buildings held by the bankrupt. No definitive reorganization plan whatsoever was worked out during bankruptcy.

It will thus be seen that the administrative work in conducting the business was very simple in character and involved only a landlord's interest in buildings leased or managed and operated by others under agreement. The other problems involved were limited to a few major items and were largely legal in character.* As stated by the lower court, the petitioners' services "were in many respects preliminary to a reorganization and were far less burdensome than those of their counsel" (R. 292). It is submitted that the petitioners' allowances should in any event be very substantially lower than the allowance to their counsel.

See *In Re Insull Utility Investments,* 6 Fed. Supp. 653 (affirmed 74 F. (2d) 510), at page 662, where the court said:

> "Receiverships, as far as fees are concerned, are of two kinds. One class calls for administrative work such as the operation of a manufacturing plant or the running of a public utility. Here the receiver renders the greater service. In the other class of cases, the problems are legal in nature and demand the rendition of legal services in following assets which have disappeared or which have been transferred, etc. In the latter class, the attorneys render the more important service."

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* NOTE: See, for example, the petitioners' own application for an allowance at R. 6, 9, 27, 41-43, 44, 57-58, 85-86, 88, 96-97. See also application of petitioners' counsel, R. 102-160. The extent to which the trustees, two of whom are attorneys of long standing, relied upon their counsel even in matters of administration is surprising.

B.

The allowance made to the trustees by the District Court is clearly unreasonable, excessive and exorbitant considered in the light of the express Congressional intent to keep administrative costs at a minimum and the public policy favoring avoidance of excessive costs in administration of bankrupt estates. The situation, we respectfully suggest, calls for expression of its views by this Court if allowances are to be kept within bounds.

Excessive fees have for a long time been one of the principal evils which Congress has sought to eradicate from the bankruptcy system. "The chief cause of the down-fall of the Bankruptcy Act of 1867 was its extravagance. Estates were swallowed up in fees and expenses until finally the very name of bankruptcy law became a synonym for licensed plundering of creditors' estates, and its administration became odious in the eyes of the people."[1]

When the Bankruptcy Act of 1898 was subsequently adopted, the framers of the act manifested "the utmost solicitude to guard against extravagance."[2] Throughout the entire Act the intent of Congress to avoid excessive costs is apparent. Not satisfied with setting forth express limitations upon compensation of receivers, trustees and referees in Sections 48 and 40, Congress inserted in Section 72 a provision that

> "Neither the referee, receiver, marshal or trustee shall *in any form or guise* receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (Italics added.)

However, the hope that waste had been abolished was not fulfilled and extravagance was frequently the despair of creditors. In 1933 a Senate Committee reported that administration expenses amounted "virtually to a confiscation of the

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[1] Remington on Bankruptcy—3rd Ed., Vol. 6, Sec. 2632.
[2] *Ibid.*—Sec. 2632,

rights of creditors."[3] In response to those complaints, Congress when enacting Sections 77 and 77B of the Bankruptcy Act attempted to "hit the evil of extravagance."

Realty Associates Security Corporation, et al. v. *O'Connor, supra,* in which, at page 299, this Court remarked:

> "Extravagant costs of administration in the winding up of estates in bankruptcy have been denounced as crying evils."
>
> *Continental Illinois National Bank* v. *Chicago, supra.*

In the very act containing Section 77B[4] Congress again made its intention clear when it stated:

> "The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interest of the creditors therein."

Senator Norris emphasized the purpose of that Section when he said on the floor of the Senate on May 2, 1934 (78 *Congressional Record,* p. 7909):

> "There ought to be something said about the receivers and the attorneys for receivers and their fees. It ought to be said, I think, that the amount of the fee of a receiver should be reasonable. *I believe that is the law now, but if we say it again, probably more attention will be paid to it."*[5]

Despite this plain and unmistakable intent on the part of Congress to lessen administration costs by cutting down al-

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[3] Preliminary Report—Investigation of Bankruptcy and Receivership Proceedings in the U. S. Courts (S. Report No. 365—73d Congress, 2d Session).

[4] Sec. 3 of the Act of June 7, 1934; 48 Stat. 923, Sec. 3.

[5] The Senator may well have had in mind a situation similar to that which prevailed in the Eastern District of New York where this estate is being administered. For the fiscal year ending June 30, 1935, it is reported that expenses of administration consumed 45.44% of all assets of estates being administered in that district, which was the highest ratio in the entire country. Vol. 9, *Journal of the National Association of Referees in Bankruptcy,* pages 115-116.

lowances to as low a basis as is consistent with the sound administration of bankrupt estates,[6] trustees, receivers and their counsel have continued to request enormous allowances.[7] In the case at bar, for instance, the trustees originally requested the sum of $142,059.96. (R. 99) (nearly ten times the amount which was finally awarded to them) for ten months of part-time service.

It is no wonder, therefore, that the amount of the compensation sought by bankruptcy and reorganization officials has stirred public indignation,[8] alarmed governmental officials,[9] and called forth rebukes from some of the lower courts.[10] As one court has remarked, many reorganization officials "seem to have lost their sense of proportion" and reorganizations have often degenerated into "a mad scramble for advantage."[11]

It is submitted that a declaration by this Court on the specific question of reasonable fees for reorganization officials is urgently needed if the usefulness of Section 77B is to be preserved. Trustees have been requesting compensation on the basis of past fees which were awarded during a period when excessive fees were a prevalent evil. This may be illustrated by the words of one of the trustees herein, who urges

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[6] *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682, 684.

[7] In one case an aggregate of over $2,840,000 for services was requested,—*In Re Paramount Publix Corporation*—(unofficially reported in Commerce Clearing House Bankruptcy Service, Sec. 3637). This total was cut by the District Court to an aggregate of approximately $766,000. An aggregate of over $1,600,000 for services and expenses has been requested in the reorganization of Middle West Utilities Company (New York Times, January 23, 1936). See also, material mentioned in footnotes 9 and 10, *infra*.

[8] For an expression of extreme indignation, see the editorial in the New York World Telegram, July 20, 1935, at page 14. See also comment in the New York World Telegram of July 15, 1935, at page 22.

[9] See Preliminary Report of the House Committee for the Investigation of Real Estate Bondholders Reorganization (known as the Sabath Committee), House Report No. 35, 74th Congress, First Session. See also Volumes 1-8 of the Hearings before a Special Committee on Investigations of Bankruptcy and Receivership Proceedings in United States Courts, United States Senate, 73 Congress, 2d Session, Pursuant to S. Res. 75.

[10] *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682; *In Re National Dept. Stores*, 11 F. Supp. 633.

[11] *In Re Memphis St. Ry Co., supra* 685.

that he is entitled to larger fees than those allowed below because he "has received a considerable number of what may be considered substantial fees and allowances in bankruptcy, equity and reorganization proceedings" (R. 249). Further, it is doubtful that general warnings will suffice. The situation is comparable to that presented in *In Re Gilbert*, 276 U. S. 294, when special masters were warned that excessive allowances would not be tolerated. There Mr. Chief Justice Taft said, at page 296:

> "We are desirous of making it clear *by our action* that the judges of the courts, in fixing allowances for services to court officers, should be most careful, and that vicarious generosity in such a matter could receive no countenance." (Italics ours.)

C.

That the allowance of $90,000 to the petitioners was excessive and exorbitant and that the award of $14,628.50 more nearly approximates a reasonable award is further shown by a comparison with the amounts recently allowed by some district courts and by the Interstate Commerce Commission in other receivership, bankruptcy and reorganization matters.

In *In Re Memphis St. Ry. Co.*, 11 F. Supp. 682, the District Court fixed reasonable allowance for two trustees who were administering a street railway company at $600 and $300 a month, respectively, a total of $900 per month, whereas even the reduced amount allowed the petitioners by the Circuit Court of Appeals is equivalent to approximately $1,500 per month. The debtor corporation in that case had gross assets of $17,601,489 (as compared with gross assets, as valued by the petitioners, in the instant case of $14,205,996.18 [R. 100]) and an annual gross income of $1,781,114.* Obviously, the administration of a street railway was a much more difficult and complicated task than the administration of the real estate corporation involved in this proceeding.

In *In Re Republic Gas Corporation* (not yet officially reported but unofficially reported in C. C. H. Bankruptcy Serv-

* Figures from page 4262 "Fitch Stock and Bond Manual", Volume 11, issue of September 20, 1935, Section XV.

ice Section 3734), a district judge in the Southern District of New York fixed the sum of $18,000 as fair and reasonable compensation for a trustee, who, for a period of one year, had administered the affairs of a debtor corporation *without the assistance of counsel.* In the instant case the trustees have been collectively compensated at the same rate and in addition their counsel has been compensated at the rate of $60,000 per annum (R. 293). The administration of the affairs of the debtor in that case was certainly as arduous as the administration of the bankrupt estate herein, since the debtor was a public utility with gross assets of $10,560,394 and an annual gross income of $2,314,126.*

In the *Chicago South Shore and South Bend Railroad* reorganization the Interstate Commerce Commission was asked to fix reasonable compensation for a trustee who was administering an electric interurban railroad approximately 90 miles in length. The railroad operated 64 passenger trains daily, approximately 51 per cent. of its revenue was derived from the carriage of freight, and it had 460 employees. The Interstate Commerce Commission fixed $500 a month (which is approximately equivalent to the amount allowed *each* of the petitioners by the Circuit Court of Appeals) as the reasonable compensation for one of the two trustees, leaving undetermined the question of compensation for the other trustee.†

Thus we find at least three instances involving corporations approximately equal to the bankrupt in size, where compensation has been awarded to trustees on a scale comparable to that awarded by the lower court, and in each case it is obvious, from the nature of the corporation being reorganized, that the problems of administration were more difficult and varied and the responsibilities at least as great as those presented by the administration of the bankrupt herein.

A comparison may also be made with the compensation of trustees in larger railroad reorganization proceedings under

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* Figures from page 2858 "Standard Bond Descriptions", Volume O-Z, Issue of Dec. 14, 1935, Volume 9, No. 916B, Section 11.

† Decision of the Interstate Commerce Commission (Finance Docket No. 101165) decided December 5, 1935.

Section 77 of the Bankruptcy Act. Certainly the duties and responsibilities connected with the operation of large and extensive railroad properties are more onerous than those which were cast upon the Trustees in Bankruptcy in the instant case.

In *In the Matter of Missouri Pacific Railroad Company, Debtor,* No. 6935 (D. C. E. D. Mo., Eastern Division), by order No. 43 entered June 22, 1933, the court fixed the compensation of trustee L. W. Baldwin (former head of the Road) at $3,000 per month and trustee Guy A. Thompson (former President of the American Bar Association) at $1500 per month. Those trustees are operating 7,406 miles of railroad, and have charge of property of a book value of $664,947,552, with funded debt outstanding of $575,031,300.

In *In the Matter of Chicago, Rock Island and Pacific Railway Company, Debtor,* No. 53209 (D. C. N. D. Ill., Eastern Division), by order No. 29-A entered March 17, 1934, the compensation of the trustees was fixed (until further order) as follows:

Governor Frank O. Lowden	$15,000 a year
Mr. James E. Gorman	$36,000 a year
Mr. Joseph B. Fleming	$15,000 a year.

These trustees, for an aggregate compensation of only $66,000 for a full year, operate 8,333 miles of road and are trustees of a debtor with assets of a gross book value of $548,712,145.

Clearly, the duties and responsibilities of these railroad reorganizations require "the cooperation of the best legal minds and business acumen" about which Judge Inch was so much concerned in his opinion.

It is therefore submitted not only that the amount of $90,000 "was plainly excessive" but that the amount of $14,628.50 awarded by the Circuit Court of Appeals more nearly approximates reasonable compensation for the petitioners' services which, from the undisputed facts in the record, involved for each of petitioners part time services extending over a period of less than ten months, did not interfere with the trustees carrying on their other businesses or profession,

included comparatively little administrative work and involved only a few major problems all of which were primarily legal in character.

CONCLUSION.

It is respectfully submitted that Section 48 of the Bankruptcy Act is applicable to the compensation of petitioners as trustees in bankruptcy and that the order of the Circuit Court of Appeals should accordingly be affirmed. If by any chance this Court should hold Section 48 inapplicable, it is respectfully submitted that this Court should, for the reasons stated above, either determine the amount which would constitute reasonable compensation for the services of the petitioners as trustees in bankruptcy or remand the matter to the Circuit Court of Appeals for determination laying down such rules and standards for its guidance as may be necessary.

Dated, February 1, 1936.

Respectfully submitted,

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APPENDIX.

Statutory Provisions.

BANKRUPTCY ACT.

"CHAPTER 5.—OFFICERS, THEIR DUTIES AND COMPENSATION.

"Section 33. **Creation of Two Offices.** The offices of referee and trustee are created." (U. S. C., Title 11, § 61)

"Sec. 44. **Trustees; appointment.** The creditors of a bankrupt estate shall, at their first meeting after the adjudication or after a vacancy has occurred in the office of trustee, or after an estate has been reopened, or after a composition has been set aside or a discharge revoked, or if there is a vacancy in the office of trustee, appoint one trustee or three trustees of such estate. If the creditors do not appoint a trustee or trustees as herein provided, the court shall do so." (U. S. C. Title 11, § 72).

"Sec. 48. **Compensation of trustees, receivers and marshals.**—(a) Trustees shall receive for their services, payable after they are rendered, * * * such commissions on all moneys disbursed or turned over to any person, including lienholders, by them, as may be allowed by the courts not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than fifteen hundred dollars, two per centum on moneys in excess of fifteen hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars. And in case of the confirmation of a composition after the trustee has qualified the court may allow him, as compensation, not to exceed one-half of one per centum of the amount to be paid the creditors on such composition.

(b) In the event of an estate being administered by three trustees instead of one trustee or by successive trustees, the court shall apportion the fees and commissions between them according to the services actually

rendered, so that there shall not be paid to trustees for the administering of any estate a greater amount than one trustee would be entitled to.

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(e) Where the business is conducted by trustees, * * * as provided in clause five of section *two* of this Act, the court may allow such officers additional compensation for such services by way of commissions upon the moneys disbursed or turned over to any person, including lienholders, by them * * *; such commissions not to exceed six per centum on the first five hundred dollars or less, four per centum on moneys in excess of five hundred dollars and less than one thousand five hundred dollars, two per centum on moneys in excess of one thousand five hundred dollars and less than ten thousand dollars, and one per centum on moneys in excess of ten thousand dollars: *Provided*, That in case of the confirmation of a composition such commissions shall not exceed one-half of one per centum of the amount to be paid creditors on such composition: *Provided further*, that before the allowance of compensation notice of application therefor, specifying the amount asked, shall be given to creditors in the manner indicated in section *fifty-eight* of this Act." (U. S. Code, title 11, § 76.)

"Sec. 72. **Compensation restricted.**—Neither the referee, receiver, marshal, or trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act." (U. S. Code, title 11, § 112.)

§ 3 of the Act of Congress of June 7, 1934.

"* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein." (§ 3 of the Act of Congress of June 7, 1934, 48 Stat. at L. 923, included in 11 U. S. Code Anno. as § 76a.)

Section 77 B.—Corporate reorganizations.

"(c) Upon approving the petition or answer or at any time thereafter, the judge, in addition to the jurisdiction and powers elsewhere in this section conferred upon him * * * (11) may refer any matters to a special master, who may be one of the referees in bankruptcy, for consideration and report, either generally or upon specified issues, and allow such master a reasonable compensation and reimbursement for his services and actual and necessary expenses. * * *"

"(i) If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State or Territorial court, whether before or after this amendatory Act takes effect, a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words 'Federal court' shall include the district courts of the United States and of the Territories

and possessions to which this amendatory Act is or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii." (U. S. Code, Title 11, § 207 (i)).

"(k) If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 22, who shall be compensated as provided in section 40; (2) the first meeting of creditors shall be held as provided in section 55, upon notice as provided in section 58; (3) a trustee or trustees shall be appointed as provided in section 44, and be compensated as provided in section 48; (4) claims which are provable under section 63 may be proved as provided in section 57, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 64; (6) sales shall be made as provided in subdivision (b) of section 70; (7) dividends may be declared and paid as provided in section 65. None of the sections enumerated in this subdivision (k), except subdivisions (g), (i), (j), and (m) of section 57, and subdivisions (a) and (e) of section 70, shall apply to proceedings instituted under this section 77B unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this Act, except such as are inconsistent with the provisions of this section 77B, shall apply to proceedings instituted under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to 'bankrupts' shall be deemed to relate also to 'debtors.' 'Bankruptcy proceedings' or 'proceedings in bankruptcy' shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication." (U. S. Code, Title 11 § 207 (k)).